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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent's arguments for complete absolution of the husband under Texas law, set forth on pages 17 to 25 of his brief, we respectfully submit, fall short of sustaining the proposition contended for.

Having stated:

> "The petitioner's brief cites no cases in which Texas courts have • • • revised a division of property or an allowance for support after the divorce action has been finally closed and judgment rendered. It is believed that no such cases can be found in the Texas courts." (p. 20, respondent's brief),

respondent refers to the cases of *Gray* v. *Thomas*, 83 Tex. 246 and *Whetstone* v. *Coffey*, 48 Tex. 269, cited by us on page 14, our main brief.

In the *Whetstone* case, the Court said at page 276:

> "It would seem, that, as between her and her husband, it would be equally reasonable that she should not be debarred of her rights in the community property, where neither she nor he brought the property in question in the suit for divorce."

The *Gray* case is to exactly the same effect. Even the *Keller* case (*Keller* v. *Keller*, 135 Tex. 260) cited by respondent on page 20 of his brief holds likewise. In that case there was an agreement made in contemplation of divorce; the agreement divided certain property between husband and wife and it was incorporated in the divorce decree entered a little more than a month later. Subsequently at the suit of Mrs. Keller, the Court divided "an undivided item of community property" (a sum of $20,000) which had not been mentioned in the settlement agreement nor in the decree.

It should be emphasized that in none of these three cases was there any claim of fraud or error, judicial or clerical (see distinction among errors made on page 23, respondent's brief), or even error on the part of either of the parties or both.

Respondent's footnote on page 21 seeks to nullify the effect of the said authorities by stating that they dealt with community property of which, he says, there was none in the instant case. To begin with, the record is silent as to whether there was or was not community property here, but more significantly, respondent's own comments on page 19 of his brief (that in the cases where the Texas courts give monthly or annual allowances to a wife, they do not grant alimony as such, but "merely give effect to

an equitable and convenient division of the parties' property") destroy whatever value said footnote might otherwise have. For that being so, the *Gray, Whetstone* and *Keller* cases stand for the proposition that the Court may at anytime after the divorce decree impose upon the husband additional or new obligations of periodic payments.

Whether we call periodic payments which (by now, it is clear no one disputes) the Texas Courts may provide for, alimony, which is a burden *in personam*, or a "convenient division of the parties' property", *i. e.*, a burden *in rem*, we respectfully submit is immaterial when the time arrives to apply the formula of *Helvering* v. *Fitch*, 309 U. S. 149, that it must appear "that local law * * * have given the divorced husband a full discharge and leave no continuing obligation however contingent" before the wife may be saddled with taxes.

As This Court put it in *Douglas* v. *Willcuts*, 296 U. S. 1, 8:

> "However designated, it was a provision for annual payments to serve the purpose of alimony, that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments."

A comment should be made about the case of *Helvering* v. *Fuller*, 310 U. S. 69, cited and referred to on page 8, respondent's brief. In that case, there was absolutely no question that

> "the Nevada court retained no power to alter or modify the divorce decree. It seems to be *admitted* that under Nevada law the wife's allowance once made is final" (quoted from the opinion, p. 73; emphasis ours).

This is far from the situation here.

With regard to the effect of New York law discussed on pages 15 to 17, respondent's brief, it should be observed that *Kroner* v. *Kroner*, 23 N. Y. Supp. (2d) 670 cited on page 15 of that brief has absolutely no relevancy. It certainly does not even purport to contend for the proposition that the divorced Mr. Pearce could not be required by the courts of New York to support his former wife should the necessity therefor develop. On the other hand, the case of *Riemer* v. *Riemer* to which the said page 15 invites attention does hold that a wife may sue her husband (previously divorced at her instance in a Massachusetts court) for necessaries, and hold him.

We have not been able to discover any authorities construing the effect upon this question of § 125 of the New York Public Welfare Law, but the whole direction of the section seems to be to avoid, if at all possible, burdening the Public Welfare authorities with the expense of maintaining a person about to become a public charge, and even husbands who have been abandoned by their wives have been held liable (*Jones* v. *Jones*, 161 Misc. 660); wives have been held responsible for the keep of their husbands (*Hodson* v. *Picker*, 159 Misc. 356; *Hodson* v. *Stapleton*, 248 App. Div. 524); and grandparents for the keep of their grandchildren (*Calhoun* v. *Calhoun*, 256 App. Div. 672).

Whatever the effect of New York law may be, we say that it is clear from all of the discussion about Texas law in our briefs and even in respondent's brief, that under Texas law there is a continuing liability, albeit contingent—or at least doubt and uncertainty on the subject, with regard to the effect of which enough has already been said in the main briefs of both parties.

It is clear that the annuity agreement is, as we have stated on page 6, our main brief, "nothing more than a substitution of one form of security for another, • • • a plan whereby petitioner received moneys in satisfaction of all claims she might have against her husband for support."

It is certainly not "tantamount to a transfer of a lump sum or income-producing securities" as asserted on pages 5, 9 and 10, respondent's brief. Such a capital transfer would have been subject to the control and the caprice of petitioner; it would have the attributes of property which she could have retained in the form of money or other property or converted into that form.

More convincingly, the annuity might be likened to and viewed as an irrevocable trust. While, once established, the husband could not control it, nevertheless, the wife, petitioner herein, never at any time could do that. Before the annuity was established, it was the husband's choice whether he would or would not establish the annuity (pp. 20-21, Record). When he did exercise the choice by establishing the annuity, he merely created another device whereby to meet his continuing obligation to support.

In *Douglas* v. *Willcuts, supra* (296 U. S. 1), THIS COURT said at page 9:

> "We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor (citing cases). * * * The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. Burnet *v.* Wells, *supra.* In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly."

Respectfully submitted,

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